

251180

ORIGINAL

BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

DEPT. OF TRANSPORTATION
RECEIVED

AUG 13 - 8 P 3:32

In the matter of the citizenship of

DHL AIRWAYS, INC.

under 49 U.S.C. 40102(a)(15)

Docket OST-2002-13089 - 398

**WILLIAM ROBINSON'S RESPONSE TO THE CALJ'S REFERRAL OF THE
DENIAL OF ROBINSON'S MOTION TO VACATE, AND REQUEST FOR AN
INTERIM STAY PENDING THE DEPARTMENT'S RULING**

Philip Le B. Douglas
Julianne M. Plumb
Pillsbury Winthrop LLP
One Battery Park Plaza
New York, New York 10004
Phone: (212) 858-1000
Fax: (212) 858-1500

Counsel for William Robinson

Date: August 8, 2003

)	
In the matter of the citizenship of)	
)	
DHL AIRWAYS, INC.)	Docket OST-2002-13089
)	
)	
under 49 U.S.C. 40102(a)(15))	
)	

William A. Robinson, through his attorneys Pillsbury Winthrop LLP, hereby responds to Chief Administrative Law Judge Yoder 's (the "CALJ") reference to the Decisionmaker (the "Robinson Order") of his August 5, 2003 denial of Robinson's motion to vacate the CALJ's July 21, 2003 deposition order.

On April 17, 2003, the Department issued its Instituting Order requiring the CALJ to confine the proceeding to “the current citizenship of DHL Airways only”. On July 30, 2003, confronted with the CALJ’s failure to comply with that Order, the Department again directed the CALJ to limit his inquiry to ASTAR’s current ownership: “[t]he Chief Administrative Law Judge is hereby ordered and directed to conduct this

Dated: August 8, 2003

proceeding in a manner consistent with the directions outlined above, *limiting the scope of issues and discovery to the current ownership of ASTAR Air Cargo, Inc., by BD Air Partners, LLC.*" Order 2003-7-36 at p. 4 (emphasis supplied). The body of the Order confirmed that the CALJ may "examine only the citizenship of ASTAR under its BDAP ownership in order to determine the citizenship of the airline as it now exists." *Id* at p. 3. The Order strictly prohibited any inquiry into DHL Airways, Inc. ("DHL") at the time of Mr. Robinson's majority ownership:

To the extent that the parties to this proceeding have attempted to probe into historical developments in the DHL Airways ownership structure, all participants are reminded that the Department has already found that historical ownership is not relevant to the current citizenship status of ASTAR. Our instituting Order specifically stated that the past citizenship of this airline would be considered in the context of the pending formal enforcement complaints. Historical ownership may be relevant to compliance disposition and perhaps other aspects of the continuing fitness of the carrier, but those issues are not before the Chief Judge in this proceeding. The Chief Judge's role is limited to determining the citizenship of ASTAR as it exists at this time. Id. (emphasis supplied).

Despite these repeated injunctions, the CALJ persists in his effort to force a deposition on Mr. Robinson, and is now requiring the Department to issue yet a third order regarding the scope of this citizenship proceeding. It should be clear by now, however, that any inquiry into Mr. Robinson's sale of his ownership interest to BDAP would be in direct contravention of the Department's prior Orders. On July 14, 2003, Mr. Robinson severed all ties with DHL Airways by selling all of his stock in the company. Mr. Robinson is not now an ASTAR officer, director or shareholder, and plays no role in its operations. Because he has absolutely no continuing involvement with ASTAR or any of the DHL affiliates, Mr. Robinson has no ability to influence their current or future conduct. Mr. Robinson's knowledge of ASTAR is thus purely

historical –it is limited to his role as a mere shareholder under the prior ownership structure – and therefore clearly falls outside of the scope of the citizenship proceeding.¹

FedEx and UPS advance, as they must, new reasons to depose Mr. Robinson. They now assert that Mr. Robinson is “one of the most knowledgeable people” concerning “(1) BDAP’s acquisition of his ownership interest in DHL; (2) the extent to which the acquisition was controlled or influenced by Deutsche Post; and (3) the manner in which the terms and conditions of the sale may affect [ASTAR’s] future operations.” Joint Answer in Opposition to William Robinson’s Motion to Vacate at pp. 2-3. None of these conclusory, after-the-fact justifications has merit.

First, the Department has clearly ruled that historical ownership issues like the three specified by FedEx and UPS are irrelevant to any determination of ASTAR’s current status. *Second*, even if historical ownership were relevant, it would be hard to see how “the terms and conditions of the [Robinson] sale” to the three new American owners of ASTAR bears on the question of Deutsche Post’s future control of ASTAR. *Third*, the “terms and conditions” of Mr. Robinson’s sale of stock to BDAP are, in any event, undisputed and a matter of public record. Thus, even if this issue were at all relevant, FedEx and UPS could determine for themselves whether ASTAR’s new owners (all of whom are American) over- or underpaid Mr. Robinson for his stock. This is why FedEx and UPS recently conceded that they can “prove that [ASTAR] [is or] is not a citizen of the United States, *no matter what the relevant time for that analysis may be.*” See Answer in Opposition to Motion to Strike, filed August 6, 2003. *Fifth*, to the

¹ At best, the testimony sought from Mr. Robinson may be relevant to an enforcement proceeding concerning DHL Airway’s *past* compliance with the statutory citizenship requirements, but that is an issue that the Department has clearly excluded from this proceeding.

extent FedEx and UPS argue that the new relationship is a sham, it is self-evident that the two parties to that relationship – Deutsche Post and BDAP – not Mr. Robinson – are “the most knowledgeable people.”

The issue is not whether last month's *sale* of Mr. Robinson's interests was controlled by Deutsche Post, but whether *ASTAR and its new owners and managers* are controlled by Deutsche Post. Because there is no operating history under the new arrangement, that question, for the time being, seems to be simply one of law based on the four corners of each relevant contract. There is no basis, therefore, for FedEx and UPS to assert that Mr. Robinson may have knowledge of the “manner in which the terms and conditions of the sale may affect [ASTAR's] future operations”. The question can be determined without discovery from anyone, much less Mr. Robinson, who has nothing to do with ASTAR, DHL or their future relationship.

Even if Mr. Robinson's testimony had some tangential relevance to the current ownership of ASTAR, a deposition would be contrary to DOT rules and practice. Unlike the Federal Rules of Civil Procedure, Department practice disfavors depositions. *See* 14 CFR § 302.26. In DOT proceedings, depositions are allowed only on “rare” occasions. *See, e.g., Air Transport Association v. City of Los Angeles*; Docket No. 50176, Order 95-4-5, 1995 WL 44644 (DOT) at *23 (April 3, 1995) (“only rarely are depositions taken in any [DOT] proceedings”); *TWA-Ozark Acquisition Case*, Docket No. 43837, Order 86-4-59, 1986 WL 69997 (DOT) at *4 (same). This is not one of those “rare” occasions.

It should be noted that, insofar as Mr. Robinson is concerned, the CALJ has repeatedly overlooked Mr. Robinson's procedural and substantive rights:

- The CALJ's original June 20, 2003 Order requiring Mr. Robinson to submit to deposition was issued without any prior notice to Mr. Robinson and was never served on him.
- The CALJ's July 21, 2003 Order granted FedEx's and UPS' Motion to Compel before Mr. Robinson timely filed his opposition.² That opposition, which correctly anticipated the Department's July 30 Order, was never considered by the CALJ.
- The CALJ's August 5, 2003 Order denying Mr. Robinson's Motion to Vacate did not address any of the arguments made in that motion.³ On the other hand, FedEx's and UPS' conclusory assertions were discussed and accepted at face value.

We note in closing that FedEx's and UPS' effort to drive DHL out of business has become a vendetta against Mr. Robinson personally. These parties, which have threatened a video deposition, have littered the public record with false claims that Mr. Robinson has "defied" the CALJ, and is a "recluse" and "composite." It is time to bring this senseless campaign against Mr. Robinson to a halt.

In the event that this Department is not able to promptly rule on this matter, Mr. Robinson requests an interim order staying the CALJ's June 20 and July 21 Orders authorizing the deposition of Mr. Robinson until the Decisionmaker does rule. Although, as a matter of law, those orders are not binding on Mr. Robinson absent enforcement by the United States District Court, the United States Magistrate Judge assigned to FedEx and UPS' Petition seeking enforcement has asked us to seek a stay from the Department. Such an order from the Decisionmaker would assist the Magistrate Judge in determining whether to proceed with or stay the District Court proceeding.

² The CALJ granted the Motion to Compel in the morning of July 21, 2003. Mr. Robinson's answer to the motion was filed at 3:21 p.m. that afternoon, within the three business day period authorized by the CALJ's June 18, 2003 scheduling order. By its terms, the CALJ's July 18, 2003 Order shortening the response period to 24 hours, applied only to "future motions" filed after that date.

³ The CALJ did not serve Mr. Robinson with his order denying the Motion to Vacate.

WHEREFORE, Mr. Robinson requests that this Department vacate the CALJ's July 21, 2003 Order and rule that the deposition of Mr. Robinson is neither material nor necessary to the remaining issues in this proceeding. In the event that the Department is unable to rule promptly, Mr. Robinson further requests an interim stay of the CALJ's June 20 and July 21 Orders.

Respectfully submitted,

Philip Le B. Douglas

Philip Le B. Douglas
Julianne M. Plumb
Pillsbury Winthrop LLP
One Battery Park Plaza
New York, New York 10004
Phone: (212) 858-1000

CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of August, 2003 served William Robinson's Response To The CALJ's Referral Of The Denial Of Robinson's Motion To Vacate, And Request For An Interim Stay Pending The Department's Ruling in the manner indicated below:

US DOT Dockets U.S. Department of Transportation 400 Seventh Street, SW Room PL-401 Washington, D.C. 20590 (by courier)	The Honorable Ronnie A. Yoder Chief Administrative Law Judge Office of Hearings, Room 5411, M-20 U.S. Department of Transportation 400 Seventh Street, SW Washington, DC 20590 (by courier)
Warren L. Dean, Jr. Patricia N. Snyder Matthew D. Schwartz Thompson Coburn LLP 1909 K Street, NW Suite 600 Washington, DC 20006 (by fax 202.585.6969)	R. Jeffery Kelsey Nancy S. Sparks Richard R. Roberts G. Bailey Leopard, Jr. Legal-Litigation Dept. Federal Express Corp. 3620 Hacks Cross Road, Bld. B, 3 rd Floor Memphis, TN 38125 (by fax 901.434.4523)
David L. Vaughan Michael J. Francesconi Kelley Drye & Warren LLP 1200 19 th St., NW, Suite 500 Washington, DC 20036 (by fax 202.955.9792)	Edwin O. Bailey Wiley Rein & Fielding LLP 1776 K Street, NW Washington, DC 200036 (by fax 202.719.7207)
Sanford M. Litvack Joanna Swomley Quinn Wmanual Urqhart Oliver & Hedges 335 Madison Ave., 17 th Floor New York, NY 10017 (by fax 212.702.8200)	Stephen H. Lachter Roxanne & Clements Lachter & Clements LLP 1150 Conecticut Ave, NW Suite 900 Washington DC 20036 (by fax 202.835.3219)
Elliott M. Seiden Garfinkle, Wang, Seiden & Mosner PLC 1555 Wilson Bld., Suite 504 Arlington, VA 22209 (by fax 703,522.0958)	



Tatiana Lamon